NICK E. DEMIENTIEFF
STATE OF ALASKA

IBLA 83-909, IBLA 84-42 Decided June 15, 1984

Appeals from that part of decision of the Fairbanks District Office, Alaska, Bureau of Land Management, reinstating allotment application F-028730, and holding for approval 2.26 acres, and declaring null and void in part right-of-way F-12378, and from decision of the Fairbanks District Office, Bureau of Land Management, dismissing a protest to proposed land exchange F-81506.

Affirmed in part; reversed in part.

1. Alaska: Native Allotments -- Alaska: Homesteads -- Segregation

   A homestead application segregates land from subsequent entry by a Native seeking to establish use and occupancy under the Native Allotment Act until the homestead entry is canceled on the official records of the Bureau of Land Management.

2. Alaska: Homesteads -- Withdrawals and Reservations: Effect of

   Where land included in a homestead entry is described among lands withdrawn subject to valid existing rights, the withdrawal attaches to the land upon cancellation of the entry.

APPEARANCES: Judith K. Bush, Esq., Fairbanks, Alaska, for appellant Nick E. Demientieff; Barbara L. Malchick, Esq., Anchorage, Alaska, and E. John Athens, Jr., Esq., Fairbanks, Alaska, Assistant Attorneys General, State of Alaska, for appellant State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On July 18, 1983, the Fairbanks District Office, Bureau of Land Management (BLM), issued a decision reinstating Nick Demientieff's Native allotment

application F-028730 and holding for approval certain acreage. The decision rejected, however, Demientieff's claim to approximately 80 additional acres. The decision also partially invalidated a Federal aid highway right-of-way (F-12378) which had issued to the State of Alaska in 1971. The invalidation was based on the fact that the right-of-way conflicted with the lands held for approval.

Both Demientieff and the State appealed the July 18, 1983, decision. These appeals were docketed together as IBLA 83-909. On September 12, 1983, BLM issued a decision dismissing a protest by Demientieff against a proposed land exchange (F-81506) between the United States and the State of Alaska. In dismissing the protest, BLM held that all of the issues presented in the protest were presently before this Board in connection with the appeals from its July 18 decision. Demientieff's appeal from this decision was assigned docket number IBLA 84-42. On October 20, 1983, Demientieff, through counsel, filed a motion to consolidate the appeals from the July 18 and September 12, 1983, decisions. This motion was granted on November 10, 1983.

A chronology of the relevant facts is necessary to a complete understanding of the basis for our conclusions in this case.

On September 9, 1944, Fred Vollstedt filed a homestead application (F-05773) for approximately 86 acres of land adjacent to the Chena River. 1/ The homestead application segregated that land. Around this time Demientieff was involved in the river freighting business hauling freight from Nenana to Galena and Fairbanks. During his travels he was "always looking for an unoccupied place along the Chena River to pull up my barge, build a house for my growing family, and settle down" (Exh. D at 1). 2/ In 1947 Demientieff went to the BLM office in Fairbanks to inquire about a particular location. He was told by BLM the land he desired was embraced by the Vollstedt application, but that Vollstedt had not made the required improvements and had left the State. Demientieff was also informed that when Vollstedt's application was rejected, he could apply for the land. Demientieff entered the land and by October 15, 1947, he had completed construction of his house (Exh. D at 1).

On July 6, 1948, a decision rejecting homestead application F-05773 was served on Vollstedt. The decision accorded a 60-day appeal period. During that appeal period, on July 27, 1948, all the lands described in the Vollstedt application were withdrawn by the Assistant Secretary of the Department of the Interior for use by BLM as an administrative site. Public Land Order No. (PLO) 503, 13 FR 4481 (Aug. 4, 1948). 3/ Also during that

1/ The Vollstedt application described the following land: Sec. 7: Lot 5 and the SE 1/4 SE 1/4; Sec. 8: Lot 14; T. 1 S., R. 1 W., Fairbanks meridian.

2/ With his statement of reasons Demientieff included numerous documentary exhibits listed as exhibit A through exhibit FF. In its response to Demientieff's statement of reasons the State included exhibits 1 through 9. 3/ A copy of the public land order was posted in the BLM Fairbanks office notifying the public of a 60-day period to protest the public land order. Shortly after the expiration of the 60-day period, Demientieff filed a protest with the Secretary of the Interior. In that protest he stated:

"On the above-stated grounds I wish to protest Public Land Order No. 503, July 27, 1948.

time, Vollstedt filed an appeal relating only to the SE 1/4 SE 1/4 sec. 7. BLM closed the Vollstedt case as to the nonappealed portion of the application on January 25, 1949, and on February 28, 1949, the rejection of the SE 1/4 SE 1/4 of sec. 7 was affirmed (Exh. Y at 3).

On September 21, 1948, Demientieff filed a headquarters site application for approximately 46 acres of land described as sec. 7: lot 5 and sec. 8: lot 14, T. 1 S., R. 1 W., Fairbanks meridian (Exh. L). By decision dated September 27, 1948, BLM rejected the application (Exh. M). 4/

Demientieff appealed. The Associate Director, BLM, affirmed the rejection decision, stating that at the time the application was filed the land was withdrawn by PLO 503. In the final paragraph the Associate Director stated:

> In view of the foregoing, the Acting Manager's decision is affirmed, subject to the applicant's further right of appeal to the Secretary of the Interior. The applicant may, if he desires to acquiesce in this decision, apply to the Regional Administrator at Anchorage, Alaska, for a special land-use permit [SLUP] for such portion of the land in his application as is occupied by his improvements.

(Exh. O). The BLM Regional Administrator had previously recommended issuance of a SLUP (Exh. S at 3). The Director, BLM, agreed with the recommendation stating that if Demientieff continued his occupancy in good faith "he will be given an opportunity in due course of time to acquire patent to a suitable area" (Exh. V).

BLM issued Demientieff a 5-year SLUP on April 15, 1951, embracing 3.33 acres encompassing his improvements (Exh. Y). BLM subsequently renewed the SLUP for a period of 5 years (Exh. Y).

On December 15, 1960, Demientieff filed Native allotment application F-027148 for the same 3.33 acres described in his SLUP (Exh. I at 1). BLM

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fn. 3 (continued)

"I need a five (5) acre Headquarters and Manufacturing site located where my improvements are in the S.W. corner of lot 5 and the N.W. corner of the S.E. 1/4 of the S.W. 1/4 [sic] of Section 7, Range 1 W. Township 1/S. of the Fairbanks Meridian, Alaska." (Exh. P at 2).

4/ BLM stated numerous grounds for rejecting the application including that it embraced two lots covering 45.95 acres while the headquarters site law allowed sale of only 5 acres; that the land was withdrawn from entry by PLO 503; and that all the land was encompassed by the Vollstedt homestead application. In conclusion the Acting Manager stated:

"It should be noted, however, that any such occupancy would probably be considered a trespass, for at that date [Demientieff had alleged in his application initial occupancy on July 20, 1947] the lands which you describe were embraced in the Vollstedt homestead application which was filed on September 9, 1944, as stated above." (Exh. M at 2).

rejected the application on November 3, 1961, as being barred by the PLO 503 withdrawal (Exh. K). 5/

Meantime, the Secretary of the Interior had partially revoked PLO 503 to exclude 1.03 acres from the administrative site and to make that acreage available to Demientieff. 6/ On April 18, 1961, BLM sent Demientieff a new Native allotment application (F-028730) describing the 1.03 acres (Exh. CC). Demientieff signed the application on October 11, 1961, and the Bureau of Indian Affairs (BIA) certified the allotment application on October 20, 1961 (Exh. 2). Later, on July 21, 1965, Demientieff amended this application to include 0.84 acre outside the area covered by PLO 503 (Exh. 3).

BLM recommended that both parcels be approved (Exh. 4). However, before issuing an allotment certificate, BLM requested that BIA determine whether Demientieff desired to file for any additional lands (Exh. 5). Although BIA initially informed BLM that Demientieff had advised it that he

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5/ BLM stated in the decision: "We have, however, taken due cognizance of the applicant's use and occupancy of a portion of these lands in spite of his occupying them at such a time and under such conditions that he could have established no claim to title under existing laws and regulations." It further indicated that Demientieff's occupancy had been formalized by issuance of a SLUP, and it added:

"Furthermore, at our request, the Secretary of the Interior revoked that part of Public Land Order No. 503 which had withdrawn the lands involved, by issuing Public Land Order No. 2524, dated October 23, 1961. P.L.O. 2524, in paragraph 2, provides that the lands shall not be available for application by Mr. Demientieff until opened by an order issued by this office. Such an order is being prepared, and the parties involved will be promptly notified when it is issued. At such time, an allotment application from Mr. Demientieff would be timely. His present application is premature and must be rejected. (43 CFR 67.1)."

6/ In a Land Examination Report dated Jan. 11, 1961, BLM set forth the rationale for recommending a partial revocation of PLO 503:

"It has been determined that the above described lands may be deleted from the Administrative Site without hindering or restricting the future building or other land use plans of the Bureau.

"The aforementioned Native occupancy is without prior valid rights such as would allow the occupant to make a valid claim or application. However, throughout the years while Mr. Demientieff has lived on the land, he has constantly attempted, through various and numerous representatives, to assert a claim based on Native occupancy.

"To avoid further unfavorable publicity and to eliminate this awkward and untenable situation, this partial revocation is proposed.

"Thereafter the lands will remain segregated by classification until the occupancy problem is resolved." (Exh. BB at 2).

would file on additional land (Exh. 6), BIA finally notified BLM that he would not (Exh. 7). 7/ On July 17, 1969, BLM issued a certificate of allotment for the two parcels. 8/

On November 17, 1969, the State of Alaska filed an application for the right-of-way in question. The application stated that the ROW was sought to construct a Federal aid primary highway. The application was granted by BLM on July 30, 1971, pursuant to the Act of August 27, 1958, as amended, 23 U.S.C. § 317 (1982). The relationship of the right-of-way to allotment application F-028730 as finally adjudicated in BLM's July 1983 decision is apparent from maps in the case record. The acreage held for approval extends over the centerline of the road constructed pursuant to the right-of-way grant.

In March 1983 Alaska Legal Services Corporation requested that BLM reopen Demientieff's Native allotment application F-027148 (the 1960 application). It sought a determination that Demientieff was entitled to the entire Vollstedt entry acreage (86 acres) as an allotment. In June 1983 BLM prepared a Native Allotment Field Report which recommended that Demientieff receive all the land originally applied for in F-027148. Also in June 1983 the State and the United States issued notice of intent of the proposed land exchange (F-81506). Even though the proposed exchange did not involve any land described in Demientieff's 1960 or 1961 allotment applications, it did concern land that had been described in the Vollstedt homestead application.

On July 18, 1983, BLM issued the decision from which these appeals have arisen. BLM explained that F-027148 was originally rejected because the filing was subsequent to the PLO 503 withdrawal, but that policy changed and if the applicant's claimed use and occupancy predated a withdrawal, the application must be considered. BLM vacated the November 3, 1961, decision rejecting the 1960 allotment application. It also reinstated F-028730 for the express purpose of conveying to Demientieff the remaining acreage requested in the original application.

7/ The BIA memorandum, dated June 6, 1969, to BLM states:

"Mr. Demientieff has now decided that he wants title issued for only the land he has now filed on. He decided on this action because of the length of time he has spent allready [sic] and the uncertainties of action on future applications. If he decides to pursue title to other land that he and his wife use, his wife will file.

"I feel that this is his final decision, so recommend that you issue the certificate of allotment at such time as you can."

(Exh. 7).

8/ The total acreage allotted was 1.91 acres which was slightly greater than that described (1.03 plus 0.84) in the application and amendment. The parcel described as 1.03 acres was apparently determined later to be actually 1.07 acres.

BLM found that because Demientieff's use and occupancy predated the withdrawal, he met the requirements for approval, and it held for approval 3.26 acres, later adjusted by decision of July 28, 1983, to 2.26 acres. The later decision explained that Demientieff had already received patent to 1.07 acres of the 3.33 acres described in the 1960 application, and, therefore, only 2.26 acres remained to be conveyed. In the July 18 decision BLM stated that because no application was filed for the additional 80 acres prior to the revocation of the Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970), by the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (1982), such acreage could not be considered.

On appeal Demientieff claims that he failed to receive all the land for which he had intended to apply and that he should be entitled to 86 acres, or, at a minimum, 46 acres, which was that described in his 1948 headquarters site application.

It is obvious from the case record that Demientieff's occupancy of the site in question was at all times in good faith, and that he originally entered with the express purpose of establishing a business and a home for his family. However, regardless of Demientieff's good faith intentions, this Board is not at liberty to ignore the law which is applicable to this case.

[1, 2] At the time Demientieff entered the land it was segregated from entry by the Vollstedt homestead application. 9/ PLO 503 then withdrew all the land for use as an administrative site, "subject to valid existing rights." The only possible "valid existing right" was Vollstedt's homestead claim which had previously been rejected, but for which the appeal period had not expired. Although Vollstedt did file an appeal for part of the homestead acreage, that appeal was denied, and the entire Vollstedt homestead case was closed in 1949. Where land included in a homestead entry is described among lands withdrawn subject to valid existing rights, the withdrawal attaches to the land upon cancellation of the entry. Jack Z. Boyd (On Reconsideration), 15 IBLA 174, 81 I.D. 150 (1974); Paxton J. Sullivan, 14 IBLA 120, 80 I.D. 810 (1973). Thus, there were no valid existing rights in this case which survived the withdrawal. Demientieff's entry could not be considered as a valid existing right which survived the withdrawal because his entry was legally barred by the homestead application. The fact that the homestead application served as a bar was made clear by BLM in its early decisions. See notes 4, 5, supra.

This Board has held that no rights may be initiated under the Native Allotment Act by occupation and use of land not open to appropriation. David Capjohn, 14 IBLA 330 (1974). In addition, where a Native files a Native

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9/ As this Board stated in Estate of Guy C. Groat, Jr., 46 IBLA 165, 173 (1980):

"The notation rule, as expressed in 43 CFR 1825.1, reflects the well-established Departmental policy that land segregated from the public domain is not subject to any form of appropriation until its restoration to the

allotment application for land segregated from appropriation, the application is null and void ab initio and fails to give rise to any equitable interest. Estate of Guy C. Groat, Jr., supra at 174.

In this case the partial revocation of PLO 503 in 1961 did not alter the fact that Demientieff had entered the land at a time when it was not open to appropriation. Such use and occupancy could not provide the basis for an allotment, even when the withdrawal was partially revoked. See Paul D. Tony, 43 IBLA 245, 248 (1979).

Despite this legal prohibition to an allotment for such lands, BLM patented 1.07 acres of those lands to Demientieff in 1961 as a Native allotment. That action is not before us in this appeal, however.

In this case BLM has found that Demientieff is entitled, as part of his Native allotment, to 2.26 additional acres. Demientieff claims he should receive much more. For the reasons stated above, the law precludes transfer to Demientieff of any additional acreage in the area in question. 10/

Appellant also claims that the Government is estopped from denying him additional allotment acreage. As early as 1948 in appealing the rejection of his headquarters site application, Demientieff charged that he was encouraged by the acting manager of the BLM Fairbanks office to enter the Vollstedt homestead prior to the rejection of that homestead so that he "would have prior right to said claim because of my use, occupancy and improvements there on" (Exh. N at 2). In his March 17, 1949, decision the Associate Director, BLM, rejected these contentions and provided a further right of appeal to the Secretary (Exh. O). Rather than appeal, Demientieff accepted the offer of a SLUP and he later accepted a Native allotment, relating to BIA that he desired no further land. It is now sought by this appeal to revive the estoppel argument. The record, however, fails to show the affirmative concealment or affirmative misconduct which is alleged by Demientieff and which is necessary to establish a claim of equitable estoppel. See United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978).

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fn. 9 (continued)
public domain is noted on the tract books. State of Alaska, 6 IBLA 58, 66-67, 79 I.D. 391, 395-96 (1972); California and Oregon Land Co. v. Hulen and Hunnicutt, 46 L.D. 55, 57 (1917); Hiram M. Hamilton, 38 L.D. 597 (1910). See Joyce A. Cabot, 63 I.D. 122, 123 (1956). The primary objective of this policy is to assure that all persons wishing to apply for available public land will have an equal chance to do so. Duncan Miller, 66 I.D. 388, 392 (1959); Elmer F. Garrett, 66 I.D. 92, 95 (1959). The rule establishes that previously segregated lands become available to the public at that point in time when the termination of an earlier claim is noted on the tract books."

10/ Even if Demientieff were entitled to additional acreage, it is clear that he could not amend his application to encompass 86 acres, or even 46 acres. Since such an amendment would not be for correction of a technical error or for correction of a mistaken land description, but rather an attempt to claim land in addition to that which was described in the 1960 and 1961 allotment applications, it would not be a proper amended application. See Charlie R. Biederman, 61 IBLA 189 (1982).

The July 1983 BLM decision approving further acreage for allotment was improper. Therefore, that part of right-of-way F-12378, which crosses that land, is not null and void.

Since appellant's claim to additional allotment acreage in the area in question must be rejected as a matter of law, the request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 18, 1983, decision appealed from is affirmed so far as it denies amendment of allotment application F-028730 to state an increased claim of approximately 80 acres, reversed to the extent it holds F-028730 for approval for 2.26 acres, and reversed so far as it partially voids right-of-way F-12378. The protest decision appealed from is affirmed. The consolidated case records on appeal are remanded to BLM for action consistent with this opinion.

Bruce R. Harris
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge